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In the Supreme Court of the United States

No. ~~934~~ 104
OCTOBER TERM, 196~~0~~1.

RELIANCE PICTURE FRAME COMPANY,

Petitioner,

against

COVENTRY WARE, INC.,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

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In the Supreme Court of the United States

No. 984.

OCTOBER TERM, 1960.

RELIANCE PICTURE FRAME COMPANY,

Petitioner,

against

COVENTRY WARE, INC.,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

This is a copyright infringement action brought by way of Summary Judgment against admitted copying and admitted infringement of a particularly piraical nature. The case involves only the issue of validity of notice of copyright on works of art.

As a belated de ense for its actions petitoner has attempted to muddy clear waters. Petitioner ses problems where none exist.

The carefully considered opinion of the Court of Appeals for the Second Circuit in the case at bar (p. 19, *infra*) cuts through the loose reasoning of petitioner and sharply restates the well known and long followed practice in marking works of art with copyright notice. There is no problem here. No valid reason appears to exist under the rules and decisions of this Court for granting a petition for a Writ of Certiorari.

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED.

1. Is there any reason to upset the broad marking provisions of 17 U. S. C. Sec. 10 with respect to applying notice of copyright by affixing it to each copy of the work published?

2. How can something not in Sec. 10 be read into it when 17 U. S. C. Sec. 20 relating to position of notice on the published work specifically states where notice must be placed only with respect to books, periodicals, and musical compositions, but with Sec. 20 placing no limitation on possible location of notice in the case of works of art?

3. Should the copyright law be burdened with any requirement that attempts to dissect an article sold as an integral whole, such dissection attempting to say that the statue of David by Michelangelo is the work of art and the integral base on which David stands is not, or which attempts to say that in an integral wall plaque only the molded face is the work of art and not the supporting back?

4. Should the copyright law be further burdened with an interpretation of the language of 17 U. S. C. Sec. 10 that "affixed to each copy" means inserted or impressed in or upon a work of art when the dictionary definition says affix means "to affix a stamp to an envelope"?

5. How can petitioner at this late date successfully contend that the intent of Congress in passing the 1909 Copyright Act was something other than the clear language of the statute, and something other than the practice followed by the Copyright Office and the trade for fifty years?

STATEMENT OF FACTS.

Respondent is a small manufacturer and distributor of high quality artistic goods to the department store and gift shop trade. Petitioner is a considerably larger manufacturer and distributor of picture frames and wall plaques to the ten cent store and chain store trade.

Respondent's copyrighted wall plaques are beautiful and distinctive. They measure 9½" wide, 24" high and ½" thick, and sell in gift shops, etc., for $14.00 a pair. The cheap, small, but almost identical copies of these plaques made by petitioner sold in the ten cent stores for $1.98 each and are one-half the area. That petitioner killed respondent's business in these items is evident.

The Construction of Respondent's Wall Plaques and the Place and Form of Notice: Each of respondent's copyrighted wall plaques has a pressed plastic face portion made from thin vinyl plastic sheet having a thickness of only two hundredths of an inch (.020"), this sheet being formed under heat and pressure to provide in intaglio or relief the desired three-dimensional artistic design. The four edges of the plastic sheet are simultaneously shaped to interestingly contoured rearwardly extending flanges giving a shallow box-like shape to the molded plastic face sheet. Received inside the most rearward edges of the flanges of the face sheet is a Masonite or pressed wood backing sheet which is rigid and strong, being ⅛ inch thick and completely covering the back of the face sheet but spaced from the plane thereof by the rearward depth of the flanges. A number of small molded plastic spacer cups, such as eight, each about an inch in diameter and one-half inch thick, are cemented with high strength cement between the inside of the flat portions of the facing sheet and the backing sheet of Masonite and the edges of

the backing sheet are strongly cemented to the flanges to form the assembled work of art which is then painted over parts only of its front face by silk screening or similar technics to provide the complete work of art.

The notice of copyright is then affixed to the completed work of art, the notice comprising an oval-shaped label measuring one inch on its longer axis and three quarters inch on its minor axis and bearing the following notation:

Hand decorated
Coventry Ware, Inc.
© Made in U. S. A.

The notation can be clearly read without a magnifying glass. The label is secured by strong adhesive to the Masonite backing sheet of the work of art and is readily and easily visible to anyone even casually examining the work of art. The label is of contrasting color to the Masonite so that it stands out.

No fault has been found with the notice, merely with the place where the notice is affixed on respondent's wall plaques.

In the District Court the parties both filed Motions for Summary Judgment, and at the hearing on these motions petitioner admitted before the Court and prior to argument that it had copied and did infringe, and that its sole defense was that respondent's notice of copyright was not in compliance with the statute. The Court of Appeals for the Second Circuit in its decision in the case at bar (pp. 20-25, *infra*) has sharply denied this defense.

ARGUMENT.

1. Copyright Notice Under Title 17 U. S. C. Sec. 10. Section 10, Title 17, Copyrights, U. S. C. reads in its entirety as follows:

> "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title. July 30, 1947, c. 391, Sec. 1, 61 Stat. 652."

This portion of the statute covers notice generally. It requires only that "such notice shall be affixed to each copy thereof published or offered for sale." In the instant case respondent's notice of copyright is "affixed to each copy." There is *no* requirement in this section as to *where* the notice is placed so long as it is affixed to each copy.

2. Copyright Notice Under 17 U. S. C. Sec. 20. Section 20, Title 17 U. S. C. reads as follows:

> "The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music. One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice. July 30, 1947, c. 391, Sec. 1, 61 Stat. 652."

Thus, the statute very specifically states *where* the notice must be affixed with respect to books, printed publications, periodicals, and musical works.

There is *no* such specific provision in any of Sections 10, 19 or 20 as to *where* notice must be affixed to a work of art, and the broad provisions of merely "affixing the notice to each copy" of Section 10 certainly apply. If respondent's wall plaque in its entirety, that is in its fully assembled form, with the molded plastic facing sheet, the stiff backing sheet, the spacers and the painting all cemented into assembled and unitary form constitutes the work of art, as it does, then notice has been applied thereto in full compliance with the statute.

3. To Accept Petitioner's Argument Would Necessitate Dissecting Works of Art. Petitioner contends that only the thin molded plastic front of respondent's integral plaque is the work of art. To dissect the integral whole of respondent's wall plaque destroys the plaque and becomes ridiculous. It would lead to some ridiculous situations. For example, in the statue of David, by Michelangelo, a beautiful sculptured figure of David stands on a small pedestal which is no part of David but is pleasingly coordinated with and secured to David so that David stands up without falling down. The pedestal or base actually is, we believe, part of the work of art. Now assume David is made and sold in a size, as we have all seen it, only a foot high. Petitioner argues, in effect, a copyright notice would have to be put on David himself. Would it be put across his chest, the small of his back, or where? Wherever it would be placed on David it would deface the statue. Petitioner argues that notice could not be put on the pedestal.

We do not think this is the law, nor should it be the law. To so hold sets up impractical and unworkable standards.

That petitioner's contention is not the law is evident from another example. This is the adequacy of the form of notice used in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 12 U. S. P. Q. 156. In this case fabric was registered as a work of art under Section 5(h). In describing the notice the Court said:

> "The cloth, so 'converted,' bears upon its edge at each repetition of the design printed 'notices' of copyright which are concededly adequate under the Copyright Law."

In other words, in this case the notice was on the margin of the fabric and it was held satisfactory. But applying the rule as proposed by petitioner in the case at bar the copyright notice would have had to be placed on the work of art itself which literally would mean over-printing on the design printed on the cloth. This was not the rule of law in *Peter Pan v. Martin Weiner* (*supra*). See also *Peter Pan Fabrics, Inc. et al., v. Dixon Textile Corp.*, 125 U. S. P. Q. 39 (C. C. A. 2d, 1960).

Nor was it the rule of law in *Peter Pan Fabrics, Inc. v. Acadia Co., Inc.*, 121 U. S. P. Q. 81 (D. C. S. D. New York, 1959), also holding valid the printing of a copyright notice on the margin or selvage edge of fabric bearing a design copyrighted as a work of art. In this case the Court said:

> "the copyrightee, having done all that is reasonably within his power to imprint the notice on the material without marring the appearance of the work, has satisfied the notice requirements of section 10."

3(a). Notice of Copyright Should Not Deface a Work of Art. It is well recognized by artists and designers that placing the notice of copyright on the face of a work of art often disfigures, defaces and detracts therefrom. Take in

the case at bar. No one will deny that if respondent had placed its notice of copyright on the face of its wall plaques the notice would become highly objectionable when the plaque was hung in a private home, an office, or anywhere except possibly respondent's sales office. Equally objectionable would be any requirement to disfigure a map by printing the notice on the map and not the margin, or putting a copyright notice on a statue itself, such as the figure of David, rather than on a pedestal supporting the statue. Or in the *Peter Pan* case (*supra*) placing the notice on the design and not on any margin or selvage edge.

See also, *Trifari, Krussman & Fishel, Inc. v. Charel Co., Inc. et al.*, 107 U. S. P. Q. 48 (D. C. S. D. New York, 1955), involving placing a copyright notice on a work of art. The Court said:

> "The nature of the copyrighted article is such that the area in which the notice may be placed is necessarily limited. It is so located, however, as to apprise anyone seeking to copy the article, of the existence of the copyright and is, therefore, sufficient to satisfy the statutory requirements. See Shapiro, Bernstein & Col, Inc. v. Jerry Vogel Music Co., Inc., 161 F. 2d 406 (C. C. A. 2nd, 1946)."

3(b). The Work of Art Is the Complete Assembly. The District Court in discussing the facts in the case at bar said (15a) in speaking of respondent's wall plaques:

> "The wall plaques were designed as decorative features for walls. They were made by having a mold pressed in plastic. The plaques had a unique and artistic design on them and were completed with a plaster board backing *so that the component parts formed an integral whole* which could be used for decorative purposes." (Emphasis ours.)

It is a fact that the integral whole of all the assembled parts form the work of art. Any thought that the thin plastic facing alone is the work of art is unsound. The plastic facing alone is so flimsy and weak that it could not be successfully sold or practically hung on the wall. An opening door would blow it off the wall.

Only after the thin plastic face sheet is permanently secured by strong cement to the backing sheet of stiff Masonite with interposed spacer cups cemented firmly in place is the complete integral whole produced which is the salable work of art constituting respondent's wall plaque. The notice of copyright when affixed to the stiff backing of Masonite is thus affixed to the work of art and not to a back secured to the work of art.

In the *Peter Pan* cases (*supra*, 7) it was recognized by the Courts that "the works of art" were the base fabric, plus the printing thereon, and leaving a selvage edge or margin which received the copyright notice. Petitioner would argue that the printing alone was "the work of art."

In the case of David, by Michelangelo, "the work of art" is the figure of David, plus the base or pedestal on which the figure stands. Petitioner would argue that the figure alone is "the work of art."

In the recent decision of Dawson, *J.*, in *Syracuse China Corporation v. Stanley Roberts*, 125 U. S. P. Q. 62 (D. C., S. D. N. Y., Feb. 2, 1960), the Court held valid and infringed a copyright on dinnerware called "Blue Mist." The china itself was of ordinary and known style and form, and the printed-on artistic design appears only on the front center portion of the dishes. The copyright notice was applied to the back or base of the china. The complete assembly of plate, dish or other china, plus the artistic design on the front was nonetheless "the work of art."

Each of respondent's plaques forms a unitary and integral work of art even as a copyrighted plate, glassware, sculpture, figurine, or printed cloth might be so considered. Attempts to dissect all such works of art, including the plaque, would, of course, result in their breakage or destruction. The plaques as sold are complete and finished products and are, as the Court below stated, integral wholes.

4. A Statute Should Be Liberally Interpreted to Effect Justice and Equity. In the instant case we have a most flagrant and piratical example of copyright infringement.

Apparently seeking to find some justification for its action, Sidney A. Harris, office manager for petitioner, filed an affidavit from which the lower court quoted the following in its opinion (16a):

> "At no time prior to notification from the plaintiff was deponent or defendant aware of any claim to copyright by plaintiff. Whether such lack of awareness resulted from failure closely to scrutinize plaintiff's works so purchased or from the absence of any copyright notice thereon deponent is unable to say * * *
>
> "In any event, deponent fully admits that defendant's works were created by using said copies of plaintiff's works as models * * *"

Thus, although admitting copying, which required close scrutiny, petitioner's officer had the audacity in his affidavit to imply that lack of awareness (of copyright notice) resulted either from failure to closely scrutinize or from lack of copyright notice and he was unable to say which because all five or more of respondent's plaques which he purchased and copied have now been lost or mislaid. It is self-evident that anyone like Mr. Harris working

every day in the field of artistic objects subject to copyright would or should closely examine from stem to stern any object copied, particularly when this involved merely turning respondent's wall plaque over in order to clearly see the notice thereon. There are strong implications here of reckless disregard for the rights of others and a disregard for language used in an affidavit.

Washington Publishing Co. v. Pearson, 306 U. S. 30 (1939), is full authority that a liberal interpretation of the copyright statute is in order. The Court said:

> "The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary works of lasting benefit to the world."

The Court also said:

> "* * * To give section twelve a more drastic effect would tend to defeat the broad purpose of the enactment."

The Court then proceeded to hold that the deposit of copies with the Copyright Registrar fourteen months after publication complied with the requirement of the statute to deposit copies "promptly."

In the instant case we ask for no such liberal interpretation of the statute but merely for a common sense interpretation to see that the intent and purpose of the statute is achieved.

In *Peter Pan Fabrics, Inc. v. Martin Weiner Corp., supra,* p. 7, the Court, through Judge Hand, said:

> "Therefore, if we construe the words of Sec. 10 with relentless literalism, dresses made out of the 'converted' cloth may be said to be 'offered for sale' without any effective notice. * * *

> "On the other hand, it is commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning. Indeed, in extreme situations this doctrine has been carried so far that language inescapably covering the occasion has been disregarded when it defeats the manifest purpose of the statute as a whole. Holy Trinity Church v. United States, 143 U. S. 457; Markham v. Cabell, 326 U. S. 404 * * *"

The Court then proceeded to find the notice of copyright adequate.

We believe the petitioner seeks in the case at bar to defeat the manifest purpose of the statute as a whole by a "relentless literalism."

See also, the "Betty Boop" copyright case of *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 23 U. S. P. Q. 295 (C. C. A. 2d, 1934), in which the Court said:

> "The purpose of the statute's requirement as to notice is to prevent innocent persons who are unaware of the existence of the copyright from suffering for making use of the copyrighted article. W. H. Anderson v. Baldwin Law Pub. Co., 27 F. (2d) 82 (C. C. A. 6); Stecher Lith. Co. v. Dunston Litho. Co. (D. C.) 233 F. 601. A reasonable construction of the statutory requirements shows that the name of the copyright proprietor, is sufficient in form, if it gives notice of copyright to one who is looking for the truth and who desires to avoid infringement."

5. Prima Facie Validity of Copyright. The Registrar of Copyrights, Library of Congress, carefully screens each application for copyright including, but not limited to, the examination of the notice of copyright thereon. If the application is not in compliance with the statutory requirements as to notice and otherwise the registration is refused. In the instant case, no fault was found by the skilled Registrar and his assistants with respondent'

notice of copyright on its wall plaques and proper formal Copyright Registrations were granted. This fact should be given due weight.

On this point, in the copyright case of *Stein et al. v. Mazer*, 97 U. S. P. Q. 310 (C. C. A. 4th, 1953), Judge Dobie said:

> "When an agency of the United States is empowered by a federal statute to issue regulations under, and also to administer and apply, that statute, and when the agency over a course of years applies that statute in a certain way, that application should be given great weight when a court is called upon to determine the meaning of the statute. Cf. Commissioner v. Southern Texas Lumber Co., 333 U. S. 496, 501; Merchants National Bank of Boston v. Commissioner, 320 U. S. 256, 260; Textile Mills Securities Corp. v. Commissioner, 314 U. S. 326, 338, 339."

In this case of *Stein et al. v. Mazer*, the Court found valid and infringed copyrights on works of art, namely male and female dancing figures, converted into use as lamps.

See, also, "The Copyright Law," published 1952 (Bureau of National Affairs, Washington, D. C.) by Herbert A. Howell, former Assistant Registrar of Copyrights, bottom of page 37:

> "Inasmuch, however, as under Section 10 the issuance of the certificate is conditioned upon 'compliance' with all requirements of the Act, including publication with the prescribed notice, the Copyright Office will not make registration unless the copies deposited bear such notice. Any certificate now issued for such material includes a statement that 'such copies bore the statutory notice of copyright.' "

6. Affixing of Notice. Section 10 of Title 17 states simply that "notice shall be affixed to each copy." This is exactly what respondent did in affixing the label bearing

the notice with adhesive to the work of art. Petitioner even cites the dictionary meanings of the word "affix" as to "fix or fasten in any way; to attach physically" and as an example cites, as "*to affix a stamp to an envelope*, one's signature to a document." This dictionary reference clearly answers and refutes petitioner's argument. Respondent's notice is under the statute "affixed" to the work of art precisely as a stamp is "affixed" to an envelope.

We quote with approval from the decision of the Court of Appeals in the case at bar:

> "Defendant also suggests that the notice, having been pasted on by a gummed label, was not 'affixed' within the meaning of section 10. We find that it was 'affixed.' The point does not require discussion."

7. The History of the Copyright Act—Title 17 U. S. C.

An excellent outline of the pertinent legislative history relating to copyright notice appears in "Copyright Law Revision Studies; Studies 7-10 (7—Notice of Copyright)" and published in 1960 by the Government Printing Office, is as follows:

(Page 7):

> "The next general revision statute, the act of July 8, 1870, made certain technical amendments in the notice provisions, but did not change the basic requirement:
>
> 'Sec. 97. *And be it further enacted,* That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statute, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon

some portion of the face or front thereof, *or on the face of the substance on which the same shall be mounted*, the following words, viz.: "Entered according to act of Congress, in the year ___, by A. B., in the office of the librarian of Congress, at Washington." ' " (Second emphasis ours.)

"Under the act of August 1, 1882, 'manufacturers of designs for molded decorative articles, tiles, plaques, or article of pottery or metal subject to copyright' were permitted to place the notice as follows:

'* * * *upon the back or bottom of such articles*, or in such other place upon them as it has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers, merchants, and trade marks thereon.' " (Emphasis ours.)

* * *

* * *

"III. The Present Law in the United States.

"A. Provisions of the Present Law.

"*The notice requirements of the present law are essentially the same as those incorporated in the act of March 4, 1909.* In general, each copy of a work 'published or offered for sale in the United States by authority of the copyright proprietor' must bear a copyright notice in the prescribed form and position." (Emphasis ours.)

* * *

* * *

(Page 9):

"B. Legislative History of the Present Provisions"

* * *

* * *

"The legislative history of the act of 1909 contains little of significance concerning the philosophy underlying the notice provisions. The basic elements of the

present notice requirement were already present in H. R. 19853, which was introduced by Representative Currier on May 31, 1906, and which was the first of the series of bills which led to the 1909 statute; the changes in the provisions which were finally enacted, and the relatively few comments on them during the hearings, dealt largely with matters of detail."

(Page 11):

"Only two changes in the basic notice provisions have been made since 1909. The first, a technical amendment made at the time of the codification of the copyright law in 1947, simply involved a change in language. The second, which was a part of the legislation enacted in 1954 to permit U. S. adherence to the Universal Copyright Convention, allows use of the symbol C instead of 'Copyright' or 'Copr.' in the notice for all types of works; before September 16, 1955, the effective date of the amendment, use of the symbol was permissible only for pictorial, graphic, and sculptural works."

Respondent accordingly fails to find any justification or valid reason for variance of the law by inference or legislative history.

The Court of Appeals for the Second Circuit in the case at bar also carefully reviewed the legislative history of the Copyright Acts and after over two full pages of discussion concluded:

"In the light of this legislative history it is surely incredible that Congress would have intended, by implication hidden in Section 19, to revive the requirement of the 1802 and 1831 acts that notice appear on the front. All the copyright legislation of the nineteenth century had prescribed in unambiguous terms the permissible location of notice, and the 1909 revision contained a section dealing specifically with the location of notice and prescribed such location only for three types of items. Thus the failure to limit the

placement of notice for other items does not arise from any lack of familiarity with the drafting devices necessary to accomplish that result. Section 19 should not be read to impose a restriction on placement which, had it been intended by Congress, would certainly have been expressly stated.

"Defendant's restrictive view of Section 19 is also inconsistent with a large body of judicial authority upholding notices which are not on the 'front' of the work of art. This Court and the District Court for the Southern District of New York have recently rendered a number of decisions upholding copyrighted works of art on dress fabric where the notice appeared on the selvage or margin of the fabric, rather than on the design itself. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 2 Cir., 274 F. 2d 487; *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 2 Cir., 280 F. 2d 800 802; *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, D. C. S. D. N. Y., 187 F. Supp. 334; *H. M. Kolbe Co. v. Armgus Textile Co.*, D. C. S. D. N. Y., 184 F. Supp. 423, affirmed 2 Cir., 279 F. 2d 555. We have also sustained a copyright on a pair of earrings, though the notice was stamped upon only one earring of a pair. *Boucher v. DuBoyes, Inc.*, 2 Cir., 253 F. 2d 948, *certiorari denied 357 U. S. 936.* In *Scarves by Vera, Inc., v. United Merchants and Mfrs., Inc.* D. C. S. D. N. Y., 173 F. Supp. 625, works of art contained on ladies' blouses were copyrighted by a notice upon a label sewed into a side seam. Perhaps the best summary of the applicable principle may be found in the decision of Judge Bicks in *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, D. C. S. D. N. Y., 134 F. Supp. 551, 554, enjoining the copying of costume jewelry, copyrighted as a work of art, where the notice appeared on the clasp. He stated: 'It is so located, however, as to apprise anyone seeking to copy the article, of the existence of the copyright and is, therefore, sufficient to satisfy the statutory requirements.' See also *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 2 Cir.,

161 F. 2d 406, *certiorari denied 331 U. S. 820; Fleischer Studios v. Ralph A. Freundlich, Inc., 2 Cir. 73 F. 2d 276, Certiorari denied Ralph A. Freundlich, Inc. v. Fleischer Studios, 294 U. S. 717.*" (Emphasis ours.)

8. Certiorari Denied in Previous Copyright Cases Involving Notice—Note that certiorari has been denied in three cases involving Notice of Copyright, and relied on in the decision of the Second Circuit Court of Appeals in the case at bar. See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 331 U. S. 820; *Ralph A. Freundlich, Inc. v. Fleischer Studios*, 294 U. S. 717; and *Boucher v. Du-Boyes, Inc.*, 357 U. S. 936.

CONCLUSION.

For the reasons set forth, common sense, law and equity have been well served in the decision of the Court of Appeals for the Second Circuit in the case at bar (pp. 20-25, *infra*). *Petitioner attempts to muddy waters that are already clear, and have been clear for fifty years.* Petitioner seeks to impose impractical and unworkable standards when they are not needed and are contrary to the express provisions of Title 17 U. S. C.

There is no conflict of law. There is no constitutional question. There is no real question under Rule 19(1)(b) of the Rules of this Court with respect to an important question of federal law which has not been, but should be, settled by this Court.

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 253—October Term, 1960.

(Argued February 16, 1961 Decided April 3, 1961.)

Docket No. 26643

COVENTRY WARE, INC.,
Plaintiff-Appellant,

vs.

RELIANCE PICTURE FRAME COMPANY,
Defendant-Appellee.

BEFORE:

LUMBARD, *Chief Judge*, and
CLARK and SMITH, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Archie O. Dawson, *Judge.*

Plaintiff Coventry Ware, Inc., appeals from a summary judgment for defendant Reliance Picture Frame Company in an action for infringement of plaintiff's copyrighted sculptured wall plaque. Judgment reversed and action remanded. Opinion below reported in D. C. S. D. N. Y., 186 F. Supp. 798.

JAMES B. BOYER, New York City (Albert H. Oldham, of Oldham & Oldham, Akron, Ohio, on the brief), *for Plaintiff-Appellant.*

RAYMOND A. WERCHEN, New York City, *for Defendant-Appellee.*

CLARK, *Circuit Judge*:

Plaintiff, a corporation engaged in the manufacture and sale of wall plaques, caused certain wall plaques to be designed by an artist and then registered them as "Molded Sculpture" with the Register of Copyrights. The plaques contained a colored, three-dimensional, but relatively flat, design, and were intended as decorative features for walls. The plaques were made by pressing a mold in plastic, and were completed with a rigid backing sheet so that the component parts formed an integral whole which could be attached to a wall and displayed. Defendant admitted copying plaintiff's plaques and selling them at a lower price. In this action for infringement, its only defense is the alleged invalidity of the copyright notice, which appeared on a small printed label firmly attached to the back of the plaques. Defendant's position is that notice of copyright must appear on the front of the work of art, and that a notice appearing on the back is insufficient. The district court, accepting this contention, granted summary judgment to the defendant, and plaintiff appeals. Judge Dawson's opinion is reported in D. C. S. D. N. Y., 186 F. Supp. 798.

The relevant sections of the Copyright Act, 17 U. S. C. §§ 1 *et seq.*, are section 10, section 19, which deals with form of notice, and section 20, which prescribes the location of the notice in certain instances. The basic notice requirement is set forth in 17 U. S. C. § 10, as follows:

> "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof * * *."

The form of the notice required by section 10 is set forth in 17 U. S. C. § 19 and "shall consist either of the word 'Copyright,' the abbreviation 'Copr.,' or the symbol ©, ac-

companied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication."

Section 19 then goes on to authorize an optional "short form" of notice which may be used on works of art and other items set forth in 17 U. S. C. § 5(f)-(k) as an alternative to the general form of notice described above. Such "short form" notice "may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided,* That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear."

Section 20 prescribes the place where the notice is to appear in the case of books or other printed publications, periodicals, and musical compositions. It places no limitations on the possible location of notice in the case of works of art and kindred items, provided that the notice complies with the general requirement of section 10 that the notice be affixed to each copy. Defendant contends, however, that a limitation on the permissible location of notice for works of art may be found by implication from section 19. Defendant reasons that the short-form notice allowed by section 19 is intended to minimize the disfigurement which would result if the long form were used. In order to prevent the short form from being mere surplusage, defendant concludes, we must assume that the long form could be used only where it disfigured the work of art—i.e., on the front. Defendant does not explain, however, why Congress would have enacted a copyright law requiring disfiguring notices on the front when a nondisfiguring notice on the back would give equally adequate warning to

prospective copyists. Neither does defendant say why, if any limitations on placement were intended with respect to works of art, they were not set forth in section 20, whose specific subject is location of the notice.

It should be noted that section 20 is the culmination of a long history of increasing liberalization of restrictions on the placement of notice. In the case of books and musical compositions, the placement of notice has always been rigidly and narrowly confined. But in the case of other items, a series of revisions have steadily expanded the permissible locations of notice. The acts of 1802, 2 Stat. 171, and of 1831, 4 Stat. 436, 437, both required notice to be "on the face" of nonbook and nonliterary items. This harshly restrictive requirement was abated slightly in the revision of 1870, 16 Stat. 198, 214, which provided that in the case of "a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statute, statuary, or model or design intended to be perfected and completed as a work of the fine arts," the notice must be placed "upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted."

The act of 1874, 18 Stat. 78, 79, completely eliminated all references to "face or front," and required instead only that in the case of the items specified above the notice appear "upon some visible portion thereof, or of the substance on which the same shall be mounted." Even this liberalized requirement was apparently thought too restrictive, however, since Congress added a special section in 1882, 22 Stat. 181, permitting "manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright" to place the notice "upon the back or bottom of such articles, or in such other place upon them as it has heretofore been

usual * * * to employ for the placing of * * * trade marks thereon."

The original House and Senate bills leading to the Copyright Act of 1909 continued the century old practice of prescribing the possible location of notice, but they expanded still further the number of such locations. Section 14 of H. R. 19853 and S. 6330, 59th Cong., 1st Sess. (1906), provided that in the case of maps, works of art, models or designs for works of art, reproductions of a work of art, etc., the notice "shall be applied * * * upon some accessible portion of the work itself or of the margin, back, permanent base or pedestal thereof, or of the substance on which the work shall be mounted." In the act as finally passed, however, 35 Stat. 1075, 1079 (1909), a specific requirement for location of notice was retained only in the case of books or other printed publications, musical compositions, and periodicals. All other items were left subject only to the general requirement, now embodied in 17 U. S. C. § 10, that notice be affixed to each copy.

In the light of this legislative history it is surely incredible that Congress would have intended, by implication hidden in section 19, to revive the requirement of the 1802 and 1831 acts that notice appear on the front. All the copyright legislation of the nineteenth century had prescribed in unambiguous terms the permissible location of notice, and the 1909 revision contained a section dealing specifically with the location of notice and prescribed such location only for three types of items. Thus the failure to limit the placement of notice for other items does not arise from any lack of familarity with the drafting devices necessary to accomplish that result. Section 19 should not be read to impose a restriction on placement which, had it been intended by Congress, would certainly have been expressly stated.

Defendant's restrictive view of section 19 is also inconsistent with a large body of judicial authority upholding notices which are not on the "front" of the work of art. This court and the District Court for the Southern District of New York have recently rendered a number of decisions upholding copyrighted works of art on dress fabric where the notice appeared on the selvage or margin of the fabric, rather than on the design itself. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 2 Cir., 274 F. 2d 487; *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 2 Cir., 280 F. 2d 800, 802; *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, D. C. S. D. N. Y., 187 F. Supp. 334; *H. M. Kolbe Co. v. Armgus Textile Co.*, D. C. S. D. N. Y., 184 F. Supp. 423, affirmed 2 Cir., 279 F. 2d 555. We have also sustained a copyright on a pair of earrings, though the notice was stamped upon only one earring of a pair. *Boucher v. Du Boyes, Inc.*, 2 Cir., 253 F. 2d 948, certiorari denied 357 U. S. 936. In *Scarves by Vera, Inc. v. United Merchants & Mfrs., Inc.*, D. C. S. D. N. Y., 173 F. Supp. 625, works of art contained on ladies' blouses were copyrighted by a notice upon a label sewed into a side seam. Perhaps the best summary of the applicable principle may be found in the decision of Judge Bicks in *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, D. C. S. D. N. Y., 134 F. Supp. 551, 554, enjoining the copying of costume jewelry, copyrighted as a work of art, where the notice appeared on the clasp. He stated: "It is so located, however, as to apprise anyone seeking to copy the article, of the existence of the copyright and is, therefore, sufficient to satisfy the statutory requirements." See also *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 2 Cir., 161 F. 2d 406, certiorari denied 331 U. S. 820; *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 2 Cir., 73 F. 2d 276, certiorari denied *Ralph A. Freundlich, Inc. v. Fleischer Studios*, 294 U. S. 717.

Defendant also suggests that the notice, having been pasted on by a gummed label, was not "affixed" within the meaning of section 10. We find that it was "affixed." The point does not require discussion.

On remand it would seem appropriate that the court grant the plaintiff's motion for summary judgment, since the defendant has admitted copying plaintiff's plaques. We shall leave to the district court the settling of appropriate remedies.

Judgment reversed and action remanded for proceedings in accordance with this opinion.